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Before the
Federal Communications Commission
Washington, D.C. 20554

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JUL 22 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Reexamination of the Policy) CC Docket No. 92-52
Statement on Comparative)
Broadcast Hearings)

COMMENTS OF HENRY GELLER

Henry Geller herewith submits these brief comments in response to the Second Further Notice of Proposed Rule Making, issued June 13, 1994. The Commission should abandon the integration of ownership into management and other related presumptive factors (e.g., local residence, experience) and focus on two criteria: diversification of ownership of broadcast media (including minority and women's ownership in this respect) and proposed substantial public service programming. Where no decisional differences are found in these two categories among two or more applicants, the Commission should employ a lottery, with the requirement that the winning applicant must operate the station for a five-year period and must file annual reports showing that it has, in fact, rendered such substantial public service.¹

First, I stress that by far the best solution is for the Commission to obtain from Congress the right to auction the frequency or channel. Experience has shown that after any required period of time, a great number of stations are sold in a private auction; it makes sense, therefore, for the government to conduct

¹ The above paragraph constitutes a summary of my position.

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its own auction initially.

Further and even more important, this approach is called for because the public trustee scheme for broadcasting is a failed system. I have set out views supporting this conclusion, and urging that in lieu of the public service obligation, the licensee be required to pay a modest spectrum usage fee, to be given over to public telecommunications. We would then have a structure which worked for accomplishment of public interest goals in children's educational programming, cultural and in-depth informational fare, etc., rather than relying on the present failed behavioral regulatory scheme (and would also have eliminated the First Amendment strains and the asymmetric regulation of cable and broadcasting).²

Because the above approaches require Congressional action, they are of no help to the Commission in dealing with its immediate problems stemming from the Court's decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). I therefore now address solutions that are flawed but nevertheless would deal with the situation under the present public trustee scheme.

There are "two primary objectives towards which the process of comparison should be directed: They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications." Policy Statement

² For a full discussion of this proposition, see H. Geller, "Broadcasting," at 125-154, New Directions in Telecommunications Policy, P. Newberg, Editor, Duke Univ. Press, 1989.

on Comparative Broadcast Hearings, 1 FCC2d 393, 394 (1965). Diversification remains a criterion of the greatest importance to the public interest regulation of broadcasting. As the Court stressed in the recent Metro decision (Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566-67 (1990), quoting Associated Press v. U.S., 326 U.S. 1, 20 (1945)), "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." See also FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 795 (1978); Policy Statement on Comparative Broadcast Hearings, supra, 1 FCC2d at 394. The participation of minorities and women in ownership can then be evaluated, based on its extent (controlling or minor), in connection with the diversification criterion. See Metro, supra.

The second factor is the public service proposed by the applicants. While this is clearly a most important goal of the comparative process, the Commission, after a disastrous experience of its own making³, has generally declined since 1965 to examine

³ In the Tampa Tribune Co., 19 FCC 100 (1954), the Commission awarded an important preference on the basis of proposed programming (43% local live). This, in effect, reversed the position in Scripps-Howard Radio, Inc., 13 FCC 473 (1949), where the Commission refused to give any decisional significance to considerable differences in proposed programming by two applicants, stating that so long as each proposal was meritorious, no preference was to be accorded. The Tribune decision led to a stultifying period (Moline Television Corp., 31 FCC2d 263, 272 (1971)):

...With the issuance of this decision, "puffing" in proposed programming became the order of the day, with local live programming soaring to over 50%... It was clearly unworkable. If one takes a sample of 35 cases during the period 1952 to 1965 (when the Commission abandoned this policy), the winning applicants on the average proposed to devote 31.5% of their broadcast

proposed programming, so long as there is no deficiency in any application (i.e., each applicant proposes to serve the public interest in a meritorious fashion) and no unusual showing in this area is not demonstrated. This led the Commission to presumptive factors -- namely, that an applicant with ownership integrated into daily management, especially if on a full time basis, would be more apt to provide continuing service meeting the needs and interests of the community or area. Bechtel has questioned the basis of the presumption, and that has led to the present proceeding.

I know of no research sustaining the presumption. My own experience, admittedly anecdotal and sketchy, would lead me to conclude that whether a station does perform in a meritorious fashion as to public service programming depends on the character and determination of the owners, not integration. If the owner, like the Post-Newsweek stations or Westinghouse or WCVB-TV (Boston Broadcasters), is committed to local public service, a station manager is retained and given the direction and resources to render such service.

In any event, the point of the exercise is to assure meritorious service. In radio, that means that some substantial

time to local live programming, whereas in fact they devoted only an average of 11.8% to such program...

In the 1965 Policy Statement, supra, 1 FCC2d at 397-398, the Commission, in effect, returned to old Scripps-Howard standard, and ended what Dean Landis aptly called "its Alice-in-Wonderland procedures" of ignoring at renewal that "...actual programming bears no reasonable similitude to the programming proposed..." James M. Landis, Report on Regulatory Agencies to the President-Elect, 1960, at 53-54.

portion of the broadcast day during the period 6 a.m. to midnight must be devoted to non-entertainment programming, with the licensee having great discretion to choose the programming. In the past, the FCC used a staff processing guideline for this non-entertainment category -- 6% for FM (then a weak service) and 8% for radio (then the stronger aural service).⁴ That guideline was directed, however, solely at scrutiny with respect to minimal service to the public. In the comparative hearing, the Commission should be concerned with meritorious or substantial public service. Indeed, that is the test whereby the incumbent licensee, often facing the challenge of a newcomer with a diversification edge, nevertheless can obtain "a plus of major significance" in renewal proceedings, warranting its renewal. See Citizens Communications Center v. FCC, 447 F.2d 1201, 1213 (D.C. Cir. 1971).⁵ I would

⁴ See Delegation of Authority to the Chief, Broadcast Bureau, 43 FCC2d 648 (1973); 59 FCC2d 491 (1976). The FCC eliminated its processing guidelines when it deregulated radio and television in 1981 and 1984. See United Church of Christ v. FCC, 707 F.2d 1413, 1433 (D.C. Cir. 1983) (herein UCC). Such guidelines are discretionary. See National Black Media Coalition v. FCC, 589 F.2d 578, 581 (D.C. Cir. 1978). The Court in UCC at n.65 did note that the guidelines "served a useful function (1) providing radio licensees with a rough yardstick by which to gauge whether they were devoting a reasonable amount of time to [nonentertainment] programming, and (2) by providing the Commission with at least one indicium of the licensee's responsiveness to his community that involved no intrusive inquiries into program content."

⁵ See also UCC, supra, 707 F.2d at 1433: "It is also clear that, in the comparative renewal setting, the absolute amount of nonentertainment programming aired by the renewal applicant continues to be one of the important factors demonstrating the 'substantial service' that may entitle the radio licensee to some degree of 'renewal expectancy.' See Central Florida Enterprises, Inc. v. FCC, 683 F.2d 508, 509 (D.C. Cir. 1982)."

therefore suggest that the guideline should be in the neighborhood of 10% non-entertainment programming during the above noted period.

In the television field, the Commission employed a staff processing guideline of 10% non-entertainment, with 5% local live and 5% informational (news and public affairs). See n.4, supra. Again, for meritorious or substantial service, the guideline ought to be in the range of 10% local live and 15% informational (the two can, of course, involve the same program such as local news) in the above time period and in prime time. I do not discuss the appropriate figures further because if the Commission decides to take this route, it clearly should issue a further notice to obtain comment on the appropriate figures.⁶

This approach cannot be criticized on the ground that it does not involve quality of public service. Of course it does not. The Commission as a government agency cannot evaluate the content of programming for its quality without violating the Act (section 326) and the First Amendment. But it can and must deal with the quantity of public service programming in order to make the required public interest determinations. See UCC, supra, 707 F.2d at 1433: "Common sense alone dictates that if the Commission has imposed a public interest obligation on radio licensees to provide programming responsive to community issues, the obligation simply cannot be fulfilled without licensees arising some irreducible

⁶ The Commission did open such a proceeding in 1971 (see 27 FCC2d 580), but it was closed out without adopting any quantitative standards. See n.4.

minimum amount of broadcast minutes."

Most important, by proceeding in the fashion urged here and providing a guideline for substantial service, the Commission will have solved a problem that has long perplexed it, licensees and new applicants for years -- how to handle the comparative renewal. As Court soundly stated in Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1970), cert. denied, 402 U.S. 1007 (1970),

...a question would arise whether administrative discretion to deny renewal expectancies, which must exist under any standard, must not be reasonably confined by ground rules and standards...

By adopting a guideline for substantial service, the Commission would for the first time have informed licensees and the public of what the ground rules are for the critically important "renewal expectancy" factor in comparative renewal situations.

It would probably be of dubious validity to cut off all opportunity for an applicant in a comparative proceeding to make a case for a preference based on some unusual showing. Just as there must be the opportunity to seek a waiver of any rule, so there should be a similar chance here. Therefore, applicants can advance reasons why their proposed programming plans merit a preference, but they should face a considerable burden of having to make a clear and compelling case that there is a demonstrated need for their proposal. As the Commission stressed in the Policy Statement, supra, 1 FCC2d at 397, "[w]e will not assume...that an unusually high percentage of time to be devoted to local or other particular types of programs is necessarily to be preferred."

It follows, also, that the Commission must be serious about promise versus performance. If applicants propose substantial service percentages or if, in the rare case, they obtain a preference because of proposed program plans, they should be required to show in annual filings and at renewal that they have met their proposals. Failure should be met with denial of renewal. Otherwise, the Commission will have repeated the stultifying pattern ushered in by the Tribune decision (see n.3, supra).

It also follows that the Commission must adopt an anti-trafficking rule. I suggest that the licensee should be required to hold the license for a period of at least five years. As the Bechtel case made clear, it becomes a joke to decide a case based on some preference and then allow the winning applicant to sell out after one year.

I believe that this anti-trafficking rule should be generally applied, and not restricted to the comparative situation. The Commission was simply wrong when it asserted in 1982 that allowing the station to go to the "higher valued use" automatically serves the public interest.⁷ A trafficker, by definition, seeks to increase the financial value of the station, so that it can be sold for more money.⁸ A trafficker may therefore cut the news staff in order to show a profit for a quick resale of the station, and will

⁷ Report and Order in BC Docket No. 81-897, 52 R.R.2d (P&F) 1081, 1087 (1982).

⁸ Crowder v. FCC, 399 F.2d 569, 571-72 (D.C. Cir. 1968), cert. denied, 393 U.S. 962 (1968).

certainly not "put profit in second place and children in first" (50 FCC2d at 19). It is absurd to assert that trafficking -- getting the highest profit -- serves the public interest as to non-entertainment programming, the agency's only area of public interest concern.⁹ It has resulted in public trusts being sold like "hog bellies."¹⁰

Finally, assuming that there are no differences between the applicants on diversification (including minority and women participation in ownership) and in the proposed programming plans of the applicants, the Commission should resort to the lottery. Congress can have no objection to its use in these circumstances where the applicants (or those remaining after eliminating any at a disadvantage on diversification) have been adjudged equal. Nor would there be a judicial problem in that case.¹¹

By adopting this approach, the Commission will have focused sensibly on the two important goals -- diversification (including minority and women's participation) and the best practicable service to the public. As to the latter, it will not be using presumptions but rather will have gone to the heart of the issue, a substantial or meritorious showing as to the amount of public service programming. By restoring the anti-trafficking rule and

⁹ FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

¹⁰ Cong. Rec. E2190, June 19, 1986 (Remarks of Cong. Al Swift).

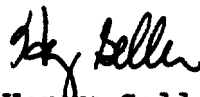
¹¹ Cf. Star Television, Inc. v. FCC, 416 F.2d 1086, 1094-95 (D.C. Cir. 1969) (dissenting opinion of J. Leventhal).

extending it to five years, and by requiring the promise vs. performance showing annually and at renewal, the Commission will made the process "real" instead of the charade it has been.

CONCLUSION

For the foregoing reaons, the Commission should act to drastically revise its comparative hearing process along the above lines. It should also seek legislative reform of the larger issue presented -- the continued soundness of the public trustee scheme.

Respectfully submitted,



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July 22, 1994